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NO.

in the Supreme Court of the United States

October Term, 1993

MONROE COUNTY, FLORIDA,

Petitioner,

vs.

NEW PORT LARGO, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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August 1993

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THE QUESTIONS PRESENTED FOR REVIEW

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IS THE EXHAUSTION OF ALL AVAILABLE STATE ADMINISTRATIVE AND JUDICIAL REVIEW PROCEDURES A NECESSARY REQUIREMENT FOR THE ACCRUAL OF A CLAIM FOR JUST COMPENSATION UNDER THE FIFTH AMENDMENT?

II

IN ORDER FOR A CLAIM FOR JUST COMPENSATION TO ACCRUE, IS A PROPERTY OWNER REQUIRED TO OBTAIN A FINAL DECISION BY THE LOCAL REGULATORY DECISIONMAKER WHEN THE PROPERTY HAS BEEN SOLD BEFORE SUCH A DECISION HAS BEEN MADE AND THE OWNER MAY THEREFORE LACK STANDING TO SEEK AVAILABLE PERMITS OR VARIANCES?

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Petitioner Monroe County, Florida respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on March 17, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488 (11th Cir. 1993). The district court's opinion is unreported but is set forth in Appendix B at B-1. An earlier opinion of the district court dealing with related aspects of the case is reported as *New Port Largo, Inc. v. Monroe County*, 706 F.Supp. 1507 (S.D. Fla. 1988).

JURISDICTION

The judgment of the Court of Appeals in this case was rendered on March 17, 1993, reversing the decision of the U.S. District Court for the Southern District of Florida which had entered summary judgment in favor of Petitioner Monroe County. The Court of Appeals thereafter denied a timely petition for rehearing and suggestion of rehearing en banc on May 20, 1993.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION, STATUTE AND ORDINANCE INVOLVED

This is a constitutional regulatory "takings" case, brought pursuant to the federal Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Fifth Amendment to the United States Constitution as made applicable to the states and their political subdivisions by the Due Process Clause of the Fourteenth Amendment.

The Fifth Amendment to the Constitution of the United States provides as follows:

> No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The entire text of the Monroe County, Florida zoning ordinance entitled "Private Airport District" (Ord. No. 14-1979) is set out in Appendix E at E-1.

STATEMENT OF THE CASE

I

THE FACTS

This case involves a challenge to a county zoning ordinance which changed the zoning of a parcel of land from residential to private airport, in keeping with the original and then-existing use of the land in question. The property consists of approximately 9.65 acres of oceanfront land located on Key Largo in Monroe County, Florida.

The land at issue had been purchased from the State of Florida in 1968. It was submerged at the time. The original purchaser filled in the land and added a runway. The property was continuously used as an airport from at least 1972 until 1985.

Because the land at issue had been reclaimed from the Atlantic Ocean, it had no zoning until 1972. In that year, it was zoned RU-2 residential. The RU-2 classification "is intended to provide residential areas in which duplexes may be constructed and occupied." Monroe County, Fla., *Code* art. IX, § 19-196 (1987). At the time, Monroe County had no zoning classification which applied to airports.

On June 5, 1979, the Monroe County Board of County Commissioners enacted a private airport district zoning ordinance. The purpose of the ordinance was "to provide a classification of property where the private airport may be established. The provisions of this article shall apply to all presently existing private airports in Monroe County, as well as to all private airports which may be established in Monroe County hereafter." Monroe County, Fla., *Code* art. XIV, § 19-295(a) (1987).

The zoning of the property was accordingly changed by the Zoning Board of Monroe County from RU-2 residential to PA private airport on January 24, 1980. The decision of the Zoning Board was upheld by the Board of County Commissioners in an appeal by Respondent New Port Largo, Inc. on September 11, 1980.

The original purchaser had sold the property (together with a large amount of adjacent land) to Respondent New Port Largo, Inc. on September 1, 1979. New Port Largo filed suit in Florida Circuit Court on October 10, 1980, seeking to overturn the decisions of the Zoning Board and the Board of County Commissioners. The zoning of the property as PA private airport was invalidated by the state trial court on January 2, 1986. Neither side appealed.

Midway through the state court proceeding, New Port Largo sold all of the land at issue. The sale took place on September 9, 1982. While New Port Largo remained as a party to the state court case until its conclusion, the state trial judge was never advised that New Port Largo had divested itself of title to all of the property in dispute.

The airport property has now been fully developed into luxury homesites.

II

THE COURSE OF PROCEEDINGS

New Port Largo and its two shareholders filed their Complaint in this case on July 7, 1987. The jurisdiction of the district court was predicated on 28 U.S.C. §§ 1331 and 1343(a) for the federal claims presented and on the doctrine of pendent jurisdiction for the accompanying state law claims.

Through a series of orders and stipulations among the parties (none of which are pertinent to the issues raised by this Petition), by June 14, 1989, the original three plaintiffs had been reduced to one; twenty-eight of the original twenty-nine defendants had been eliminated from the case; and the only two counts remaining in the Complaint were a 42 U.S.C. § 1983 claim and a Fifth Amendment claim for an uncompensated regulatory taking of the airport property. Both claims were based upon the actions of the Monroe County Zoning Board and the Monroe County Board of County Commissioners in zoning the airport property as PA private airport.

On July 17, 1989, Monroe County moved for summary judgment, based, in part, on an argument that the four-year statute of limitations applicable in Florida to federal civil rights claims had expired before the Complaint was filed.

On December 22, 1989, the district court entered summary judgment in favor of Monroe County and dismissed New Port Largo's remaining claims with prejudice. The district court held that New Port Largo's claims had accrued—and the statute of limitations had begun to run—on the date that New Port Largo had sold the property; i.e., on September 9, 1982. "On July 7, 1987, [New Port Largo] filed its complaint in this action. This filing occurred ten-months late."

New Port Largo filed a timely Notice of Appeal of the district court's order on January 17, 1990.

On March 17, 1993, the Court of Appeals issued its decision, vacating the district court's judgment and remanding the case for further proceedings. The Court of Appeals held that New Port Largo's "temporary regulatory takings claims were tolled until January 2, 1986, when the

state circuit court invalidated the County's rezoning of the subject property. [New Port Largo's] claims are not time-barred." *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1495 (11th Cir. 1993). In making this determination, the Court of Appeals ruled that "takings claims can accrue, if ever, only *after* the state judiciary's final determination on the status of the subject property." *Id.*, 985 F.2d at 1494 (emphasis in original).

In reaching these results, the Court of Appeals believed itself to be bound by the earlier decision of *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990) (referred to throughout the opinions in this case as *Corn III*): "*Corn III* is this circuit's only decision addressing the accrual date of a just compensation claim, and we are bound by it." *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1490 n.1 (11th Cir. 1993). "*Corn III*, therefore, is the law of the circuit and will remain the law unless the court, sitting en banc, corrects the standard which all judges of this panel believe to be erroneous." *Id.*, 985 F.2d at 1495 n.1 (Tjoflat, C.J., concurring).

The opinion of the Court of Appeals was accompanied by two special concurrences. Chief Judge Tjoflat wrote separately "to express my concern that Corn III's test for determining the accrual date of Fifth Amendment claims for just compensation directly conflicts with the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985)." *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1495 (11th Cir. 1993) (Tjoflat, C.J., concurring). Judge Edmondson (the authoring Judge of *Corn III*) also specially concurred, noting that "[w]hat was decided in *Corn III* does need to be stripped of some obscuring and confusing dicta." *Id.*, 985 F.2d at 1499 (Edmondson, J., concurring).

Monroe County filed a timely Petition for Rehearing and Suggestion of Rehearing En Banc on April 7, 1993. Both were denied by the Court of Appeals on May 20, 1993.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE LAW IN OTHER CIRCUITS AND WITH APPLICABLE DECISIONS OF THIS COURT

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), this Court articulated two prerequisites for the accrual of a claim under the Just Compensation Clause. First, such a claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186, 105 S.Ct. at 3116.

Second, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson*, 473 U.S. at 195, 105 S.Ct. at 3121.

The Eleventh Circuit has held in this case, in harmony with an earlier decision by the same Court, that the first prong of the *Williamson* test—the final decision requirement—can only be met by the exhaustion of all available means of state administrative and judicial review of a challenged regulation. In doing so, the Eleventh Circuit has aligned itself on this subject with the Ninth. *See Norco Construction, Inc. v. King County*, 801 F.2d

1143, 1145 (9th Cir. 1986) ("under federal law the general rule is that claims for inverse taking. . .are not matured claims until planning authorities *and state review entities* make a final determination on the status of the property.") (emphasis added).

Both the Ninth Circuit and the Eleventh Circuit appear to have confused *Williamson's* requirement of a final decision by the initial government decisionmaker with its separate and distinct command that a property owner must first resort to available state mechanisms (including judicial remedies) for obtaining just compensation before a federal takings claim accrues or may be filed. Both Circuits have thus expanded *Williamson's* final decision requirement in a manner which cannot reasonably be inferred from the text of the decision itself: "The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. . . . Exhaustion of review procedures is not required." *Williamson*, 473 U.S. at 192, 194 n.13, 105 S.Ct. at 3119, 3120 n.13.

In their interpretation of *Williamson*, the Ninth and Eleventh Circuits are in conflict with decisions of the First, Seventh and Tenth Circuits. *See Gilbert v. City of Cambridge*, 932 F.2d 51, 57 (1st Cir. 1991) ("It is apodictic that, where a state law or municipal ordinance contains provisions for administrative relief, an as-applied claim can only arise when a property owner has actually sought, and been denied, a permit."); *Biddison v. City of Chicago*, 921 F.2d 724, 727 n.3 (7th Cir.) *cert. denied*, 112 S.Ct. 192, 116 L.Ed.2d 153 (1991) ("The developer was not required to employ administrative or judicial procedures that are 'remedial' in nature (*i.e.*, seeking review of the adverse decision). . ."); *Landmark Land Company v. Buchanan*, 874 F.2d 717, 720 (10th Cir. 1989) ("A 'final decision'

requires. . .a definitive action by local authorities indicating with some specificity what level of development will be permitted. . .").

In order to resolve the existing conflict among the Circuits and to reconcile the decision in this case with this Court's decision in *Williamson*, a writ of certiorari should issue to review the judgment and opinion below.

II

THE AVAILABILITY OF JUST COMPENSATION TO A PROPERTY OWNER WHO HAS SOLD THE REGULATED PROPERTY BEFORE ISSUANCE OF A FINAL DEVELOPMENT DECISION IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT

As earlier noted, Respondent New Port Largo sold all of the land at issue in this case more than three years before the state trial court invalidated the land's PA private airport zoning. In terms of the impact of that event upon the ultimate validity of New Port Largo's claim for just compensation, the Court of Appeals held that New Port Largo's "*injury* may have ended when it sold the property, but, under *Corn III*, [New Port Largo's] *claims* did not accrue until the state proceedings had concluded." *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1494 (11th Cir. 1993) (emphases in original).

The Court thus apparently created a rule of law that a claim for just compensation cannot ripen (and the applicable statute of limitations does not begin to run) until a final development decision is obtained in all instances, even when such a decision is made long after the original property owner has given up all interest in the property in question.

There are two serious difficulties with this rule. First, the sale of unconstitutionally regulated property may itself disable the original owner from ever obtaining a final development decision and may therefore forever prevent the accrual of his or her legitimate claims for just compensation. In most instances, a *former* property owner would lack standing to seek a definitive decision from the initial government decisionmaker delineating the precise contours of permitted development of land he no longer owns.

Any subsequent owner of the burdened property would be disinclined to perform this function as well, since, having taken the property subject to the regulation (and presumably at a discount reflecting the value of the property as regulated), the new owner could not present a viable claim for just compensation. As a consequence, the unyielding application of *Williamson's* final decision requirement to regulated property that has been sold serves to punish those property owners who are unable to persevere throughout the regulatory process and to discourage the return of unfairly regulated property to full economic utility.

The problem is not merely theoretical. The plaintiff in *Williamson* spent eight years attempting to obtain a final decision only to have this Court find that it had still not succeeded in that effort. Fact patterns involving the sale of property prior to the issuance of a final development decision should become more frequent throughout the federal court system now that entitlement to just compensation for a temporary taking is firmly established. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

The second difficulty with the application of *Williamson's* final decision requirement to the accrual of claims by former property owners (particularly as interpreted by the Court of Appeals in this case) is the converse of the first: potential claims for just compensation become open-ended, lasting, conceivably, in perpetuity.

If a former owner of regulated property can satisfy the final decision requirement by means of a final development decision obtained by a subsequent owner—as the decision of the Court of Appeals in this case suggests—his claims for just compensation will come to life at that point. If the applicable statute of limitations does not begin to run until that date, however, the former property owner could then institute a claim for just compensation based upon an allegedly confiscatory regulation that was enacted perhaps decades earlier.

What this may mean in practical application is that every local regulatory body will become vulnerable to stale constitutional takings claims whenever the scope of permitted property development is clarified by regulatory enactment.

The Court of Appeals in this case noted that "[t]he Supreme Court never has addressed directly the effect of the sale of property on the accrual date of a takings claim." *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1494 n.14 (11th Cir. 1993) (citation omitted). A writ of certiorari should issue so that this Court may examine and decide upon the important interrelationships between the ripening of a claim for just compensation and the operation of the statute of limitations applicable to such claims in the context of a transfer of ownership of property subject to regulation.

CONCLUSION

Petitioner Monroe County, Florida respectfully submits that a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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